IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03/12/2003

C O R A M

THE HONOURABLE MR. JUSTICE V.S.SIRPURKAR
AND
THE HONOURABLE MR.JUSTICE N.KANNADASAN

O.S.A.No.89 OF 2003
And
C.M.P.Nos.3058 and 3059 of 2003

M/s.TVS Investments Ltd.,
(Formerly known as TVS Finance
Limited) rep., by its Executive-Legal,
Mr.Sai Kumar ... Appellant

-Vs-

M/s.Essorpee Mills Limited,
rep., by its Managing Director,
Mr.Vijaya Kumar,
Saravanampatti Post,
Coimbatore. ... Respondent

PRAYER :- Appeal against the fair and decretal order dated 8.1.2003 in Original Application No.4847 of 2002 in the Ordinary Original Civil Jurisdiction of this Court.

!For appellant :: Mr.P.H.Manoj Pandian

^For respondent :: Mr.K.Srinivasan

:J U D G M E N T

N. KANNADASAN, J.

The above appeal is filed as against the order of the learned single Judge dated 8.1.2003 in Application No.4847 of 2002 in original application No.808 of 2002.

2. The appellant herein has filed the above application before the learned single Judge, under Section 9 of the Arbitration and Conciliation Act, 1996. It is the case of the applicant that under Hire Purchase Agreement, the applicant has let on hire various machineries more fully described in the schedule to the said application and as per the terms and conditions entered into on 14.1.1999, the respondent has to pay the hire

charges for a period of 36 months. However, the respondent had failed to pay the hire charges and additional finance charges for belated payments and as on 15.11.2002, a sum of Rs.63,79,462 .14 has become due and payable by the respondent to the applicant. It is the further case of the applicant that in the Hire Purchase Agreement, necessary arbitration clause is incorporated and as such, it is entitled to invoke the said clause and approached the learned single Judge with two applications viz., O.A.No.4846 of 2002 seeking direction, directing the respondent to furnish bank guarantee for a sum of Rs.63,79,462.14 and another application in O.A.No.4847 of 2002 for appointment of an Advocate Commissioner to take possession of the machinery and handover the same to the applicant.

3. The respondent has contended that the amount was originally borrowed from one Harita Finance Limited, under various Hire Purchase Agreements and though the rights accrued in the said agreements were later on assigned to the applicant Company, the applicant cannot maintain the said applications, more particularly due to the fact that the respondent company has become a sick industry within the meaning of " Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter called as 'Act') and it has submitted an application before the Board for Industrial and Financial Reconstruction (hereinafter called as 'BIFR') to frame a rehabilitation scheme and a draft scheme was already published on 30.1.2003 and by virtue of the specific bar under Section 22 (1) of the Act, there cannot be any distress proceedings and no legal proceedings can be maintained against the respondent company which has been declared as a sick industry.

4. The learned Judge, by order dated 8.1.2003, has dismissed both the applications on the ground that the company has been declared as a sick company and the BIFR has framed a scheme. The respondent is entitled to the protection under Section 22 (1) of the Act. It is also held that the machineries, which are only accessories to the main frame cannot be allowed to be removed and the applicant has to await the final award to be passed by the Arbitrator.

5. We have heard the rival contentions of both the parties. It is seen from the records that the respondent availed hire purchase finance from Harita Finance Limited under 13 agreements during August 1993 to February 1995 and later on Harita Finance Limited assigned the rights to the appellant company and consequent to the negotiation between the appellant company as well as the respondent company, the amount due was arrived at as per the sanction letter dated 14.1.1999 and the hire purchase agreement was again executed on the same day. Clause 26 of the hire purchase agreement, proceeds as follows:-

"26. All disputes, differences and/or claims, arising out of this hire purchase agreement whether during its subsistence or thereafter shall be settled by arbitration in accordance with the provisions of Indian Arbitration Act, 1940 or any statutory amendments thereof and shall be referred to the sole arbitration of an arbitrator nominated by the authorised representative of the Owner. The award given by such an arbitrator shall be final and binding on all the parties to this agreement".

A reading of the above clause makes it clear that in case of any dispute that

arises, the parties are entitled to resort to arbitration proceedings. Hence, the appellant is well within its right to approach the learned single Judge under the provisions of Arbitration and Conciliation Act, 1996. A perusal of the hire purchase agreement clearly discloses that in the hire purchase agreement, the respondent herein is described as "HIRER". Similarly had the description as found in other clauses clearly suggest that the appellant is shown as "OWNER" of the machinery. Clause 9 of the said agreement, proceeds as follows:-

"9.In case the Hirer shall during the continuance of this Agreement do or suffer any of the following acts or things viz., either.

a) fail to pay any of the hiring instalment within the stipulated time whether demanded or not,

b) .. .. to

h) .. ..

then and on the occurrence of any such event, the rights of the hirer under this agreement shall forthwith stand determined ipso facto without any notice to the Hirer and all the instalments previously paid by the Hirer shall be absolutely forfeited to the Owner who shall thereupon be entitled to enter any house or place where the said Machinery may then be, remove and retake possession of the same and to sue for all the instalments due and for damage for breach of the Agreement and for all the costs of retaking possession of the said Machinery and all costs occasioned by the Hirer's default".

The above clause also suggest that the ownership is not transferred to the hirer until the entire payment is made. Hence, even though a draft rehabilitation scheme has been framed originally, which was later on culminated into sanctioning of the said scheme by the BIFR on 9.6 .2003, the respondent cannot avail the benefit which flows from Section 22 (1) of the said Act, inasmuch as the protection is available therein is only as against the Company and any of its properties; whereas the present application is filed only to repossess the machineries which are hired to the respondent company, the ownership of which, has not been transferred to it. It is pertinent to note that until the payment of all the instalments are made by the hirer, the ownership of the hired machinery would still remain with the appellant company and hence the present proceedings do not fall within the scope of Section 22 (1) of the Act. In support of the above proposition, reliance can be placed upon the judgment rendered by the Division Bench of this Court in Sundaram Finance Limited vs. Kamaraj National Labour Organisation reported in 2003 (4) CTC 69 (to which judgment one of us is a party). In the said judgment, it is held that in so far as the hired machinery is concerned, the question of ownership of the machineries will not be transferred and the same will remain with the finance company and unless and until the payment of all the instalments is made by the hirer, he cannot take advantage of the benefit of protection of Section 22 (1) of the Act. Similar view has been expressed in the earlier decision of the Division bench of this Court rendered in Ananta Udyog Private Ltd., vs. Cholamandalam Investment and Finance Co. Ltd. (1995 (I) CTC 206).

6. Per contra, the counsel for the respondent draws our attention to the observation contained in para 12 of the judgment rendered in M/s.Shree Chamundi Mopeds Ltd. vs. Church of S.I.T. Association (AIR 19 92

SC 1439) and tries to impress upon us that Section 22 (1) of the Act proceeds to the effect that no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company etc., shall lie except with the consent of the Board (BIFR) and contended that the term " or the like" have to be construed that the proceedings of the subject matter of the application herein falls within the scope of the above proposition of law. The learned counsel also cited an another decision viz., Agio Countertrade (P) Ltd vs. Punjab Iron and Steel Co. Ltd., and Others And Agio Countertrade (P) Ltd vs. Dhatu Sanskar Limited ((2002) 9 SCC 520) and Blue Star Ltd vs. Hindustan Photo Films Manufacturing Co. Ltd (Vol. 90 Company Cases 340) in support of the above principle. In our opinion, the above judgments do not be helpful to the respondent in as much as none of the above said cases are pertaining to the action initiated in respect of the hired machineries.

7. Under the above said circumstances, we are of the considered opinion that the order of the learned Judge is liable to be set aside and accordingly, the appeal is allowed, however, there will be no order as to costs. Consequently, connected CMPs are closed.

Index : Yes.
Internet: Yes.

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